UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

**E.R. THROUGH HIS MOTHER AND LEGAL GUARDIAN SHERRY GAINES, SHERRY GAINES,PARENT AND LEGAL GUARDIAN OF E.R.,**

Plaintiff,

v.

**NATIONAL WILDLIFE FEDERATION,**

Defendant.
_____/

**HONORABLE F. KAY BEHM**

**No. 22-cv-11173**

**MOTION HEARING**

**Wednesday, April 26, 2023**

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**I N D E X**

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Flint, Michigan

Wednesday, April 26, 2023

2:00 p.m.

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**THE COURT:** Good afternoon, everybody. We have the matter of Sherry Gaines versus National Wildlife Federation, case number is 22-11173. It looks like from the pleadings I have Mr. Miller here for the Plaintiff and Ms. Rodriguez from Defendants -- for Defendant.

Mr. Fraietta, who are you here on behalf of, Plaintiff Defendant?

**MR. FRAIETTA:** Good afternoon. I'm also on behalf of the Plaintiff, but Mr. Miller will be the primary speaker.

**THE COURT:** Okay. And then we have Mr. Hedin.

**MR. HEDIN:** Your Honor, I'm also here on behalf of behalf the Plaintiff.

**THE COURT:** All right. Ms. Rodriguez. This is your motion to dismiss, and also there were some motions to submit supplemental authority, if you would like to address your motion, please.

**MS. RODRIGUEZ:** Yes, your Honor. Thank you very much for hearing us today.

This case presents the Court with an opportunity to really exercise its very important role as a gatekeeper to the doors

of the federal courthouse, and this case should not be allowed through those doors. It is simply too little too late, and so we are here today seeking dismissal under 12(b)(6) grounds on the grounds that Ms. Gaines, the named Plaintiff in this class action, has not pled a plausible claim under the Michigan Preservation of Personal Privacy Act, and, in any event, her complaint is untimely, and I'll address those in turn with a focus on the deficiency of the pleadings here, your Honor, but, first, I think it would be important to give the Court some context for the litigation landscape that we find ourselves in.

Now, I know the *Brisco* case is also pending before your Honor, and that case, along with this one against my client, the National Wildlife Federation, is just two of the nearly 100 cases that have been filed in just over the past year or so under this same act, and all of these cases have been filed as class actions, and most of these cases have been filed against small publishers or nonprofit organizations like my client, and all of these cases contain virtually the same cookie cutter allegations.

It's also not surprising that all of these cases exclusively claim violations of this Michigan act that predate July 31st, 2016, and the reason for that, your Honor, is obvious. The reason is to take advantage of the $5,000 penalty that existed prior to this date and that no longer exists today, and, on top of that, as I mentioned, all of these cases

have been brought as class actions, which would actually be banned in Michigan state court because class actions are not allowed under this statute, and so here we are before your Honor in federal court.

So what all of that means is, regardless of the meritorious defenses that might happen down the line, the threat of that statutory damages amount, combined with the class action procedural posture that we find ourselves, all of that creates exponential risks for Defendants right here and right now.

And so with all of that context in mind, we ask this Court to take very seriously its role in evaluating pleadings at the outset and not allow deficient ones to enter into the doors of the federal courthouse. So I'd like to begin there with the deficiency of the pleadings, which is the first argument that we have raised on this motion to dismiss.

This case simply does not state a claim under the Michigan PPPA, and I'm going to take a step back and remind the Court what the PPPA prohibits and what it stands for. The PPPA does not prohibit all disclosures of any type of data. It is cabined. As applied here, it applies to written materials. So the magazine information that Plaintiffs have alleged here, and it prohibits the disclosure of information that identifies the purchaser of a magazine material, identifies a purchaser. That is an important element here. It also must identify the

specific written materials that were purchased, which is also an important element here.

Another thing to keep in mind, your Honor, is that the PPPA does not flatly prohibit disclosure altogether. There are certain exceptions that were baked in, and so the list rental process, a very commonplace marketing practice that has existed, gosh, since the '70s, if not before then, and was certainly contemplated by the legislature in the '80s when this act came into existence. There's actually an exception for that. There's an exception for disclosures to agents. All of that is just, again, to provide this Court with some additional context about the PPPA and what it actually prohibits and what it doesn't prohibit.

So keeping that in mind, what the Plaintiff has failed to do here is demonstrate, to show an entitlement to relief under this act for Ms. Gaines. The complaint is woefully deficient in showing that Ms. Gaines' information was disclosed in a manner violated the act before July 31st, 2016. It has to happen before that period in order for her to have an entitlement to relief under the very narrow version of the act that the Plaintiffs have alleged here. If the disclosure happened yesterday, if it happened a year ago, then there's not a claim here. It has to happen pre July 31st, 2016 in order for the Plaintiffs to be entitled to that $5,000 per violation statutory penalty that they are seeking here, and all they have

pled, on information and belief, is that her information was disclosed prior to July 31st, 2016, and under the well-established pleading standards of *Twombly* and of *Iqbal*, that is simply not enough. Those are conclusions. Those are legal statements, and they are not factual statements that show entitlement to relief.

You know, the only thing they can really show in this case, your Honor, is this data card that they have made a big to do of in this case, and I have prepared a PowerPoint that shows the data card that was used in this complaint as an exhibit, and also embedded into the complaint, and with your Honor's permission, I'd like to share my screen and show the data card that was included within the complaint, if that's possible in this format.

**THE COURT:** Any objection from Plaintiff's counsel, and I'm not sure who's going to be speaking on behalf of Plaintiff's counsel?

**MR. MILLER:** I will speak. It's Mr. Miller your Honor. I've never seen this PowerPoint but I have no objection.

**THE COURT:** All right. Then go ahead, Ms. Rodriguez. We will look for your PowerPoint.

**MS. RODRIGUEZ:** All right, one moment.

I'm sharing now the data card that was included on Docket Number 15 in this matter. Your Honor and opposing counsel may

inquire. You can see my screen that is entitled Ranger Rick Masterfile with enhancements mailing list.

I'm seeing a nodding from your Honor, so I'm going to go ahead and proceed.

**THE COURT:** Yes, I do have it. I was looking for the hard copy I had on my desk.

Go ahead.

**MS. RODRIGUEZ:** And so the reason why I wanted to show this to your Honor, is because, again, this seems to be really at the heart of their allegations. They have pled that this is in existence now, and they have attached it to the complaint, and this is really the basis for their belief, apparently, that Ms. Gaines' information was disclosed prior to 2016.

A few things about this data card. First of all, this is an advertisement. It is not a disclosure of information. It is an advertisement that was published, according to the allegations on a third-party website, NextMark, not by my client, the National Wildlife Federation. Yes, it does reference the National Wildlife Federation, but, again, it was posted, according to the allegations, on a third-party website, and, again, there's nothing in here. Obviously, there's no subscriber data on here. Ms. Gaines' information is not posted on here. This is merely an advertisement for the offer of rental of certain information.

More importantly, or perhaps equally as importantly, is that this data card is a very recent in time data card. It is from 2022, the year that that this complaint was filed, and Plaintiffs are asking this Court to make the huge inferential leap that the data card published in 2022 offering for sale data or offering for rent data, somehow means that Ms. Gaines' information was disclosed in 2016. That is far too great of an inferential leap for this court to make under any established pleading standards, far too great, and a number of other courts have come to that same conclusion looking at similar data cards as the one that was here.

I'll point your Honor to *Nashel versus New York Times* case. That case, similarly, found that a data card outside of the time period simply could not allow the court to reach the conclusion that the named Plaintiff's information was disclosed in 2016. In the *Bozung versus Christianbook* case, similar, the chief judge of the Western District of Michigan came to the conclusion that a data card from 2022 many simply could not mean that the named plaintiffs' information was disclosed all the way back in 2016. It was too far of an inferential leap to allow the court to make that conclusion, and this Court should, likewise, come to that same conclusion, that a 2022 data card says nothing about a 2016 alleged disclosure.

On top of that, I would like your Honor just to draw a few additional points about this data card that I think are notable

here. First of all, there are certain counts that are listed here. Plaintiffs allege this reflects counts that are reflected of the total number of subscribers that are available for rent by third parties. That's referenced here, your Honor in the segments section, and, from this information, they want you to make, again, the factual inference that this 651,000-plus names somehow included Ms. Gaines' information because it was through 2022 referenced here and somehow that is cumulative.

Well, as the chief judge in the Western District found in the *Bozung* case that makes absolutely no sense and this Court is not required to check its common sense at the door when making decisions on a 12(b)(6) motion. The court in *Bozung*, likewise, looked at the numbers here and saw they made no sense and, actually, I can go to the *Bozung* data cards to show you what I mean and how that compares to this Ranger Rick data card. So I'm going to advance to the *Christianbook* data card that was at issue there in the *Bozung* case, and, in this case, the chief judge looked at these segments, again, in a similar position on the data card and said, wait a minute, this doesn't make any sense. The plaintiffs are alleging that somehow this information includes data from 2016, but we have the total universe of numbers of subscribers here that is basically equal to the 0- to 12-month buyer's number and the 13- to 24-month buyers, that 1.9 plus the 1.3 and change equals up to the 3.2

total subscribers. So it makes no sense, as the judge found, that somehow there were also 2016 numbers built into there. It simply doesn't add up, and makes the claim not plausible, which is the standard this Court needs to eventually reach.

So going back to the Ranger Rick title. We have a similar type of situation. The numbers that are listed here, you know, they have a 12-month subscriber number of 546,000 and change and then there's also a 24-month expire number of 320,000 and change. Those numbers are even more than the total number of subscribers, which -- so it makes no sense, their claimed argument in their responsive brief here, your Honor, that somehow that is reflective of 2016 data. It gets them absolutely nowhere.

And all -- and the *Bozung* case lays that out very well, we would submit, in their decision, and that is actually one of the other motions that's before your Honor is our motion for leave to file *Bozung* as supplemental authority. That has not been opposed, and it's past Plaintiff's time to oppose that. So we would ask that your Honor grant that and consider that as part of the authority submitted in this case.

**THE COURT:** I have all that in my preview, as well as I think there were some additional cases from Judge Kumar from the Eastern District that Plaintiffs were asking. I have all that in front of me and I am considering all of that.

**MS. RODRIGUEZ:** Thank you, your Honor.

One other point that I would point out, while we're looking at this data card, for your Honor to keep in mind when evaluating the import of this data card, which, again, is really the sole basis for Plaintiff's complaints here. This is the factual enhancement they are offering to demonstrate entitlement to relief in a pre July 31st, 2016 world.

I would offer your Honor just to review this portion at the -- oops, this portion at the end here, which states "Ranger Rick Masterfile subscriber names are provided title slugged only, 'to the blank family.'" And this point really distinguishes this data card from, I believe, just about any other data card that has thus far been decided, and, also, that is really at issue in many other cases.

As I mentioned previously, the PPPA prohibits disclosure information that identifies the purchaser, the subscriber in this instance, as Ms. Gaines alleges she is, and if we are going to look at this data card, as Plaintiff has urged, then we need to look at all of it, and the very bottom of this indicates that the name -- the full name is blanked out. It is only "to the blank family," and, under Plaintiff's own allegations, that type of information is not prohibited to be disclosed by the PPPA.

Plaintiffs define the information that NWF allegedly disclosed improperly, as you may recall, personal reading information, and they define that personal reading information

consistently with the statute, and they define it to mean full name, home address, and the title of the publication subscribed to. It's laid out right there in their complaint. So using Plaintiff's own definition of private reading information, the type of information that is prohibited from being disclosed here, if we take this as face value, as Plaintiffs are asking you to make -- as Plaintiffs are asking you to do, then the blanked out full name means that there's not PRI, private reading information at issue here, and that, on its own, really distinguishes this particular factual enhancement from others that have been presented in other PPPA actions that are currently being litigated and have been litigated.

So right now, we really have the *Bozung* case -- and I'm going to turn off the share screen for now, unless your Honor has any questions about this data card or the *Bozung* one that we looked at.

**THE COURT:** No questions on those. Thanks.

**MS. RODRIGUEZ:** All right. I'm going to stop my share now.

So where this Court finds itself is we already have decisions that have found very similar factual allegations to not be enough under the PPPA. We have, just to recap, the *Bozung* decision from the Western District of Michigan issued by the chief judge there. We have the *Nashel versus New York Times* case that was issued in this district at the end of last

year, and those two cases really demonstrate why this case is not enough, and then when you add in the issue with PRI that I mentioned before with the name being omitted -- the full name being omitted, that really demonstrates in this case that there is no way the Plaintiffs can take this case and shove it over -- shove it over the line of plausibility, which, again, is the standard this Court needs to be focused on here.

**THE COURT:** In the *Nashel* case, on that data card.

**MS. RODRIGUEZ:** Yes.

**THE COURT:** If we could take a look at that. So the complaint explains -- so that's when the New York Times --

**MS. RODRIGUEZ:** Correct.

**THE COURT:** -- stopped making its data cards publicly available, and the complaint alleges that the data card says it existed from the beginning of 2015 through the entire -- in our case, from the beginning of 2015 through the entire pre 31, 2016 period. Does that matter as far as, you know, *Nashel* with it being predating the claims versus our case? Can you compare the data cards in *Nashel* to this one?

**MS. RODRIGUEZ:** Yes, your Honor. So first of all, with regard to the *Nashel* data card, the *Nashel* data card did predate the time period so it was a 2008 date on that at that data card and the Court found that it was implausible to say, you know, you can't take a data card and assume, first of all, that that is a disclosure and then assume that there was a

continued violation going forward.

Here, there is a data card that postdates the alleged time period, but the reasoning, your Honor is still the same. You can't take a snapshot in time and then assume things were happening backwards or assume improper disclosures were happening forwards. It's the same principle.

Moreover, as the data card that they allege in this complaint that apparently existed as of '15 and '16, that data card allegation is made solely on information and belief, and I would direct your Honor to *Bozung versus Christianbook* case, because, in that case, the chief judge alleged the same type of allegation that was made here, that the 2022 data card was also available in '15 or '16 with similar information, and the court correctly found that, first of all, that's implausible. It's implausible to believe that a data card from '15 to '16 would have the same information as 2022, because, as a matter of common, sense, fresh data is better, right, for marketers, and so then it would make no sense that we would have the same stale data in 2016.

But more importantly, the court also found because that allegation was made on information on belief, it could not properly credit that as an appropriate factual allegation. It left the Court to speculate as to what was actually there, and, again, it was made on information and belief, which the Sixth Circuit has found is not sufficient to show that factual

enhancement that is required under the Supreme Court's pleading standards.

So I would submit to your Honor that the allegation about this data card supposedly being available in '15 and '16 with similar data is implausible, speculative and should simply be disregarded by this Court as an improper and unsupported allegation.

**THE COURT:** If I had a copy of that, would that make a difference, if they were able to provide the 2015 or 2016 data card? If it was closer in time would that make a difference?

**MS. RODRIGUEZ:** No, I don't think it would, because, again, the data card is just an advertisement. It does not mean a disclosure happened, and that's what matters here. It's not illegal to have a third-party data broker advertise that information is available. What's illegal is the disclosure of information. There needs to be some factual basis that Ms. Gaines' information was, in fact, disclosed, and there's just simply nothing in this complaint to say that.

**THE COURT:** Let me stop you right there and ask you a question. So if I'm the New York Times in *Nashel*, and there's -- and I know that there's this advertisement, the data card that you say, why in the world would the New York Times or any of the other defendants in these cases allow for this to be out there if they didn't provide data to the data source or the

runner of this advertisement? I mean why would the New York Times ever allow this to be out there is my first question. And my second question is where else would these people get the information if not from the New York Times or from National Wildlife Federation? I mean where else does it come from? And if not from them, then why would they allow this publication to be out there.

**MS. RODRIGUEZ:** So a couple of points on that. First of all, it assumes that the Defendant knows that it's out there. So that's not pled, first of all. So let's start with that fundamental premise. Second of all, there are multitudes, multitudes of sources for this type of data, and we point out to your Honor that, actually, some of the exhibits that are attached to this complaint show that there is in fact that multitude of sources of information. There are, for example, information that could come from the subscriber themselves, through surveys that a subscriber says, "Hey, I read the Wall Street Journal. I read the New York Times. I like reading, you know, different types of information about outdoor activities." That's certainly information that exists out there. There are other types of collection efforts that might become available.

So, again, it's an inferential leap that this Court is being asked to make, given those own allegations, given this vast information marketplace that Plaintiffs themselves allege

that is out there. And so that's, that would be my first response is that it's simply too great of an inferential leap for this court to make, and that's pointed out in the *Nashel* decision, where the court says, "That's just too much, you know, I can't make that inference."

There's also pointed out in the *Wheaton versus Apple* case, where the court evaluated that and said, "Look, we can't just assume that that information came with the basis of or with the endorsement of National Wildlife, or any other third party defendant." And, moreover, your Honor, what matters, again, is disclosure. So, again, even if a defendant said, "Yeah, go ahead and advertise this," and there were no takers, there's nothing illegal that happened, and so there needs to be a demonstration of disclosure that happened in this time period in order for there to be entitlement to a relief.

And a data card that exists out there with or without the Defendants' knowledge is simply not enough to show that Ms. Gaines' information, in particular, was disclosed. It's not just that any person's information was disclosed, it's not even that Michigan folks' information was disclosed, it was that Ms. Gaines' information was disclosed. That is the question before your Honor in evaluating the sufficiency of this complaint.

I would also, with regard to -- you asked about the *Nashel* case. If anything, this case is even stronger in voting for

dismissal here because, in the *Nashel* case, there wasn't just a data card, there was also a privacy policy that existed in '15 or '16 that told consumers you can opt out of having your information disclosed, and there was also a post relevant time frame marketing study that was published by a third party that said that, in order to come one some marketing strategies, they use an e-mail list of New York Times subscribers, and that was in 2020. And so there were even more factual enhancements in the New York Times case that, actually -- that the court evaluated beyond just a data card, and the court said, "Look that's still not enough. What did Mr. *Nashel*, what was the *Nashel* disclosure? What was Mr. Robinson's disclosure here," the other named Plaintiff, and there was simply not enough, after two tries in the New York Times case, and it was a case that the plaintiffs elected not to appeal.

So when you look at that decision, and when you look at the *Bozung* decision that, again, looks at these data cards and simply finds it's not enough, we would respectfully submit that your Honor find the same, and if you have any --

**THE COURT:** I do have another one. So if the whole point of the complaint is to put the Defendants on notice of the allegations, notice pleadings, I mean they certainly know what they're alleging. They're alleging that they disclosed -- that they got their information and that they disclosed it, and, certainly, you've been -- your client has been put on

notice as to what the claim is. I mean isn't -- why isn't the Plaintiff entitled to discovery to flesh out those -- to depose the Defendant's officers and say, "Did you make any money? Did you actually sell it?" I mean she believes that they did because she started getting all of this junk mail. So she believes she did. There's -- there's advertisements that say that there's somebody out there that believes they can sell their information for some reason. I mean don't you think they're entitled to discovery and that you may ultimately prevail on these same types of arguments on an SJ motion, but not a 12(b)(6)?

**MS. RODRIGUEZ:** Absolutely not, your Honor. They are not entitled to discovery, and for one big reason, because the Supreme Court said they're not. The Supreme Court has said that a district court must insist on some specificity in pleading before allowing a potentially massive factual controversy to proceed. That's straight from *Twombly*, your Honor. The Supreme Court has recognized that discovery is time consuming. Discovery is expensive. Discovery is a drain on the resources of defendants, in particular, who are faced with class action lawsuits. That is, no doubt, a potential risk here, and so allowing discovery in order to flesh out a complaint is simply not allowed, period. It simply isn't, and it would flip the whole pleading standard on its head and put the burden on a defendant to disprove as opposed to having a

plaintiff come forward with the reasons for entitlement for relief or showing entitlement to relief.

And I would also like to briefly address the junk mail point that you brought up. Your Honor, all she alleges in this case is that she received massive junk mail. She does not say, "I subscribed to Ranger Rick magazine in XY date." She doesn't even allege when she subscribed. But let's say, you know, she says, "I subscribed on XY date and a month later, wouldn't you know it, I started getting a bunch of junk mail that all relates to wildlife stuff." She doesn't even say that. Think of all of the other reasons that you can potentially get junk mail. She's asking this Court to infer, without any factual enhancement why, that junk mail became because of the National Wildlife Federation. That connection is simply not there, and that's what this court must demand before allowing, among other things, that's what this Court must allow before, you know, allowing discovery to proceed.

I mean I understand the inherent desire to just say, "Hey, let's just go figure it out," but that's simply not enough. There has to be a gatekeeping role, and harkening back to how I started, there has to be a gatekeeping role, and that's what we're asking your Honor to invoke before we proceed into this what will undoubtedly be a massive case. So we thank you, your Honor, for your consideration. Happy to address any other questions.

**THE COURT:** No, I appreciate it, well thought out arguments. I appreciate your time and the arguments. So let's turn to Mr. Miller and see what he has to say.

Mr. Miller.

**MR. MILLER:** Yes. Thank you very much, your Honor. Data mining today is very similar to the gold rush of the 19th Century. Publishers like the National Wildlife Federation take advantage of this multibillion dollar industry. It's standard industry practice for publishers to rent or disclose subscriber information. That's one of the ways that these companies make money and she's exactly, your Honor. We filed about a hundred complaints. She pejoratively calls them cookie cutters. I don't think that's fair, but they are all very similar because it's an industry wide practice of doing the same thing. What would be implausible is if they didn't sell their data, because that's the way they make money.

And your Honor had a great question, why not discovery? If what she says is true, you open door to discovery, they'll just say, "We have nothing to produce." Of course they have stuff to produce, because as soon as the door of discovery is open, we will have clear, unequivocal, overwhelming evidence that they did it, just like what has happened in dozens and dozens of other cases that have settled for millions of dollars.

Note, your Honor, what's missing in their motion. They

never denied they did it. They never say they didn't do it. This is a cynical abuse of *Iqbal* and *Twombly* to nitpick the cases of our complaint in the hope that a court will prematurely close the doors of justice before we can get into discovery, when they know all the while their clients have done it.

And what I've learned from prosecuting dozens of these cases is that these companies work with data aggregators to create dossiers on American citizens. They pose a grave threat to privacy. Your Honor's question was right on point. How did NextMark -- how did the broker get the data? Of course they got it from NWF. There's no other way it gets into the marketplace. What happens is NWF sells it to multiple data aggregators, data appenders. It becomes what the Sixth Circuit described as data stew, and that stew becomes more and more valuable, but it only got into that marketplace from NWF because NWF is the entity that disseminated it into the market.

The Michigan legislature created the PPPA to protect privacy in reading materials, because what one reads can reveal a great deal about the person's life, and one of the reasons why I think case is even more important than our other cases is because the data card she showed you shows they disclosed information, not just about adults, but children, and, your Honor, I will represent to you that my first subscription was to Ranger Rick magazine as a kid. My Aunt Louise gave it to

me, and that's one of the reasons why I love animals to this day, and my wife and I are very involved in a nonprofit to try to save wolves in North America, and a lot of that came from Ranger Rick, but they should not be selling to data appenders and data brokers information about children.

Many publishers, like the National Wildlife Federation, have made a business decision to ignore the PPPA. Our case is a routine and straightforward case to enforce the Michigan statute. She's right. Over the last seven years, not two years, seven years, about 100 of these statutory privacy cases have been prosecuted with great success, dramatically improving the privacy rights of citizens. Most defendants settle these cases without even attempting a motion to dismiss because they know they did it and because the PPPA statute is, essentially, strict liability.

The overwhelming majority of motions to dismiss have been denied. In fact, your Honor, 15 motions to dismiss have been denied. Plus, a recent report and recommendation from your magistrate, Judge Kim Altman, on the NTBD case, which is pending before your Honor. I argued that motion. It was well-briefed. We had a long oral argument. Her opinion is very well-reasoned, and I urge your Honor to adopt it because I think Ms. Altman got it exactly right. In contrast, your Honor, only two courts have granted motions to dismiss in the Michigan district courts, the *Nashel* case from Judge Murphy,

which I'll talk about more a little bit later, but, as a preview, it's not published, and there was no oral argument. It was wrongly decided, inconsistent with the majority of the cases and easily distinguishable, and the *Christianbook* case, in the Western District was granted without prejudice and almost certainly will be reinstated, because discovery produced, your Honor, only hours before the opinion was released proved the defendant did in fact share private reading information in contravention of the statute. So we're back before Judge Jarbou to reinstate the case, and I'm confident that she will, and she ruled in our favor on the *Krassick* case. So now as to stating a claim upon which relief can be granted.

Your Honor, we all know this is governed by Rule 8. Rule 8 is liberal. All that's required is a short and plain statement. The plaintiff is not required to prove her claim with any evidence at this time. All we must do is allege facts that plausibly suggest a violation of the PPPA.

The district court opinion in *Timmerman versus 3M Company*, and that's also the chief judge of the western district, held that the Rule 8 pleading standard was satisfied in a class action where the named plaintiffs simply alleged that they were exposed to purportedly harmful chemicals in drinking water without alleging whether any of those chemicals, in that case, PFAS, had been detected in their drinking water and, if so, how much.

The point is Rule 8 is a very low bar, and we leap over it. The first amended complaint alleges that during the relevant pre July 31, 2016 time period, NWF continuously disclosed its entire digital customer database to various third parties, including data appenders, data aggregators, list brokers, marketing companies and many others. First amended complaint Paragraphs 5 and 7.

Moreover, the first amended complaint further alleges that NWF's entire customer database has been advertised by NWF for rent, sale, and exchange on the open market since as far back as the beginning of 2015 and throughout the relevant pre July 31, 2016 time period, and that over the same time, NWF in fact, routinely disclosed the entire customer database to various third parties, including data appenders, data aggregators. Your Honor, that's our operative complaint at Paragraphs 1, 5, 7, 11, 43 to 47, 62 to 65.

And here's the key, your Honor, that's the heart of our complaint, not one example of evidence. We don't rest our case on one data card. We're not required to plead any evidence at this stage of the game. All we're required to do is allege the factual basis for our case, which is presumed to be true. We do go further, and we plead some of our anticipated proof, that data card, but that's not required under Rule 8, and that is where the Defense and two courts out of 18, just 2, went awry because they get caught up in nitpicking the evidence before

any discovery takes place, in contravention of Rule 8, and misapplying *Twombly* and *Iqbal*, which are irrelevant, where the factual allegations mirror the statutory requirements. We are entitled to the presumption what we plead is true. *Iqbal* and *Twombly* only come into play when the legal conclusions are subject to a plausibility determination.

Let me give you an example, your Honor. Take a complex antitrust case, and the plaintiff says, "Five different competitors are charging the same prices." A court could very well say, "We accept that as true, counsel, but that doesn't mean that there was an unlawful conspiracy to fix the prices. Your allegations aren't enough. They're not plausible because you don't have any allegations of an unlawful agreement."

What we have is clear, plain, and simple. It's binary. They transferred the data or they didn't. We allege that they did. That's no different than an auto-neg case where the plaintiff alleges the defendant ran a red light. That's all they have to say. The defense can't say, "You've got to dismiss that case, judge, because they didn't attach a photograph of the defendant running through the red light." We're not required to give any evidence at this staple of the case.

So there are at least 15 PPPA district court opinions and one magistrate report and recommendation denying motions to dismiss, and some those motions address standing, but standing

is a failure to state a claim. If you don't -- if you do not state a claim, you don't have standing. So all of these opinions clearly support that these cases state a claim. We cited five such published opinions in our brief at Page 14, but there are also five recent opinions I'd like to call to your attention.

Most recently, March 30, 2023, Judge Kumar issued a decision denying the defendant's motion to dismiss in *Batts v Gannett*. I argued that motion, too. The defense relied heavily on *Nashel*. They had briefing on *Nashel*. Their focus of their oral argument was on *Nashel*, and Judge Kumar appropriately rejected it, as did your Magistrate Judge Altman. In *Pratt*, Judge Ludington denied a similar motion, so did Judge Lawson in the *Hall* case, and Judge Jarbou in the *Krassick* case.

So the Defense safely moves to dismiss saying that it's not plausible they were renting or selling the subscriber lists, when they know they were doing it, as it's an industry practice to do it, and they're desperate to slam shut the door of justice and to deprive us of the essential tool of discovery to prove our case. If they're telling you the truth, your Honor, they don't have any discovery. They want to shut the Pandora's box closed before we get our fair opportunity, and that's directly contrary to the law under Rule 8 and any semblance of justice. Never do they deny that their client disclosed it. This is a great example of *Twombly* and *Iqbal*

being taken out of context beyond its intended purpose to destroy meritorious cases before they're able to get off the ground.

Now, we substantiate our allegations but we don't have to do it. We didn't have to provide a data card, but the data card certainly increases the credibility of our case, and the data card is attached as Exhibit 2, and the crucial language, which was also seized upon by Magistrate Judge Altman, is that the data is cumulative of all subscribers, with, quote, Counts through 3-1-2022. So that means it goes from the past to the future.

Her argument that that's the heart of our case is false. The heart of our case are the allegations that they did. This is one prediscovery item of proof that we are not even required to do, and it's real -- and NextMark is the broker. Your Honor's question is right on point. If they didn't release the information, how on earth did the broker get it? Of course they did. They release it to multiple sources, to data appenders, to data aggregators, and that is what discovery will reveal.

They also completely ignore that we allege there was a similar card right in the heart of the pre July 2016 class period, and once you order discovery, we'll get it from them, and they don't deny that that card existed and makes our case clearly plausible.

Your Honor, I would now like to go to their reliance on the *Christianbook* case. What I would say about *Christianbook* is that's going to support us, because what happened in *Christianbook*, your Honor, is Judge Jarbou let us engage in discovery at the same time she considered the motion to dismiss. What happened? Just hours before she released her opinion, we got just the tip of the iceberg of discovery, which proved that they did it. See we're back in front of Judge Jarbou saying, "Judge, now we have the proof." We didn't have to have the proof at the time we filed it, but we got the discovery just hours before she released her opinion, which was without prejudice, without oral argument, and she got it right in *Krassick*, I think, and she's a good judge. I respect her very much, but she went too fast on *Christianbook*, and we got the goods just hours before she released her opinion.

Now, I want to talk about a little bit more about *Nashel*. *Nashel* was also decided without oral argument, is unpublished and nonbinding. I respect Judge Murphy. He comes from a certain judicial thinking, that I respect it. It's very -- let's say it's from a different perspective, and I don't mean to disrespect Judge Murphy at all, but his opinion is an outlier, because selling personal purchase information is routine, widespread, systematic. That's why we have 100 cases. That's how the publishers make their money. What's implausible is that they didn't sell their data.

But as a threshold matter, the court in *Nashel* applied the wrong legal standard. *Nashel* improperly analyzed the plausibility of the complaint's factual allegations. Judge Murphy said that the data cards make the complaint's allegations merely possible rather than plausible. That's plain error. On a motion to dismiss pursuant to Rule 12(b)(6), the question is not whether the complaint factual's allegations are plausible. The complaint's allegations must be accepted as true. The question is whether those allegations, viewed together, and all reasonable inferences drawn in the plaintiff's favor, are plausibly suggestive of a claim for relief.

The Sixth Circuit held in the *MSU* case in our brief that in deciding a Rule 12(b)(6) motion, the court must accept all well-pleaded allegations in the complaint as true and consider the factual allegations in the complaint to determine if they plausibly suggest an entitlement to relief.

In *Nashel*, Judge Murphy recast allegations, that were plainly factual in nature, as legal conclusions, merely because the underlying conduct happened to give rise to a PPPA claim. Again, your Honor, it's no different than alleging in an auto-neg case that a defendant ran a red light. The question is the plausibility of the legal claims, not the persuasiveness of plaintiff's factual allegations. As the Sixth Circuit held in *Mediacom* that the plaintiffs are not required to prove that

the allegations are persuasive, only plausible. *Nashel* is easily distinguishable on its facts. In *Nashel*, the plaintiffs rely on a pre class period data cards, 2007 and 2008, which were eight years before the class period.

We don't have that same timing issue in our case because, in our case, the screenshot includes data collected through 2022. The data card is cumulative, and it's not limited, and, of course, what the Defense would argue is, well, we can't prove it's after 3-1-2022, that's not plausible. Well, of course, that wouldn't be true either. I'm sure they're doing it to this day. It just happens to be when you're able to find a data card on the web because we don't have access to discovery, and we specifically alleged the same or similar data card was used in Paragraph 3 of our complaint.

I also want to point out, your Honor, that she wrongfully says that our complaint is solely based upon information and belief. Not true. What our complaint says, and I'll quote, "Plaintiff, Sherry Gaines, individually on behalf of all others similarly situated, makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to allegations specifically pertaining to herself and her counsel which are based on personal knowledge."

And I'll represent to the Court that the heart of our complaint is based upon seven years of experience in litigating more than 100 of these cases, and there is no law that says

that at the initial pleading stage that information and belief cannot be used whatsoever.

Additionally, your Honor, and it's an important point, and your Honor observed this. It's not a coincidence that our client got an uptick in junk mail after she subscribed to NWF. That clearly enhances the plausibility of her claims.

The last case to rely on is *Wheaton V Apple*. That's out of district. It's a California case, and it's easily distinguishable. First, the first amended complaint here contains many factual allegations concerning disclosures made by a magazine publisher pursuant to an established industry wide practice, not an isolated instance involving a technology company, Apple. We have a long history of industry practice on our side. Second, in *Wheaton*, the case involves music on phones. There was no way to establish that the music came from Apple because of the wide prevalence of music sharing devices on applications.

Here, the private reading information can only come from the magazine publisher, and while we're on the topic again of that data card, she showed you a portion of the card but not all of the card. If you look below the portion that she read to you, it shows that the first and last name of the subscriber is disclosed. That's exactly the point. That's the violation. So what happens is they disclose the names of people who subscribe to Ranger Rick, including children. So now these

advertisers know how to target families. Oh, these people are interested in animals, maybe we can sell them ammunition or guns or other stuff that relates to animals, which is their personal private reading information that these data appenders have no right to whatsoever.

And I'd like to now go -- so what I would sum up on the first part of their motion for failure to state a claim upon relief. That has been granted. The case law is 16 to 2 in district courts in Michigan in favor of allowing these cases to proceed, and the 16 cases are well-reasoned and correctly applied Rule 8. As to the statute of limitations, every single court, your Honor, in the Eastern District and Western District has rejected the Defense argument. There are seven district court opinions and one magistrate judge's report, again, your magistrate judge on the *Brisco* and *DTB* case have recommended against the Defendant's argument, which is unanimously rejected, two opinions by Judge Lawson in *Hall*, Judge Jarbou in *Krassick*, Judge Kumar in *Gannett*, Judge Ludington in *Pratt*, and even Judge Murphy in *Nashel* found that the six-year statute applies, not the three-year statute. The cases are unanimous.

Now, they attempt to rely on the *Dabish* case, which is an unpublished case in the Sixth Circuit that doesn't even cite the published opinion in the *Palmer Park* case, which is controlling, and all the courts that I cited to you rejected the Defense argument on applying the *Dabish* case. So all eight

opinions and seven cases, unanimous authority are all well-reasoned, and, your Honor, they're firmly supported by Sixth Circuit controlling authority in the published opinion of *Palmer Park Square* at 878 F. 3rd 530, as well as by the Michigan Court of Appeals published opinion in *DiPonio v Rosati* 631 NW 2d 59 hold that the six-year statute applies under circumstances where the statute itself, like here, does not provide a limitation period.

So your Honor, the way I would sum this up is this is a clear case whereby we're entitled to discovery. The Defense will never be satisfied that we've pled a plausible claim. The Defense has never denied that their client did it. They can't deny that their client did it, and if they're right, this discovery will -- this case will be over very quickly, because when we start discovery, they will say, "We have none." If they are able to certify to us that there's no discovery, that there's no evidence, their witnesses swear they didn't do it -- I say it's a one-in-a-million chance -- of course we voluntarily dismiss the case, but *Iqbal* and *Twombly* weren't designed to destroy cases before they get off the ground and are meritorious and illegally transfer data of our children. I ask your Honor to deny the motion to dismiss, and I'm here to answer any questions you might have.

**THE COURT:** When you refer to the bottom corner of the publication, your data card, it says, "Ranger Rick

Masterfile subscriber names are provided title slugged only, 'to the blank family.'"

"Gift giver names are provided title slugged and first name/last name."

So how do you know that your Plaintiff -- I think Ms. Rodriguez's point is how do you take this data card and have you sufficient -- it's not how do you show, it's a question have you sufficiently pled whether or not your Plaintiff, Ms. Gaines, is actually one of the people included in the total universe? How do we know she's actually one of the people who was a gift giver whose name was disclosed? How do you -- have you pled that?

**MR. MILLER:** So we've definitely pled, not that she's a gift giver, we pled that her information was disclosed. This is just an example from one isolated piece of evidence that we were able to get on the web that shows that they disclosed gift giver names, which is even worse. This means they're not just disclosing the names of subscribers, they're disclosing the names of the gift givers which are, obviously, people who are also interested in wildlife. Like I said to your Honor, it was my Aunt Louise, my next-door neighbor, when I was about eight years old, who loved wildlife, gifted me a subscription to Ranger Rick. So this example shows that it's even worse.

What we rely on is not the data card. The data card is corroboration. It's the type of discovery we expect to find,

but it's not the heart of our case. Our heart of our case is the allegations that that they did it based upon industry practice. That's all we have to allege is that they did it, just like all we have to allege is the defendant ran through the red light. It's for discovery to show the full extent of what they did, but this does corroborate what we're saying in the complaint. It does show that brokers are selling these lists with subscribers' names on it, including children. So this is supportive of our case. It aids in proving the plausibility, but I would submit, your Honor, we didn't even have to attach this card. Our case would easily muster the Rule 8 shortened claim statement standard without it. This simply enhances it.

**THE COURT:** All right. Thank you, Mr. Miller.

**MR. MILLER:** Thank you very much your Honor.

**THE COURT:** Rebuttal argument, Ms. Rodriguez.

**MS. RODRIGUEZ:** Thank you, your Honor. Let me address a number of things that Mr. Miller indicated. First of all, it was very curious that we heard a lot about industry practice, a lot about the other cases that Mr. Miller has worked on. What we did not hear was anything about this case and about Ms. Gaines' information. If this Court were to hold that industry practice is sufficient to state a claim for improper disclosure under the Michigan and PPPA, that would be absolutely the wrong pleading standard. The Supreme Court and

the Sixth Circuit and many other federal courts have made it clear that you must show entitlement to relief through the pleading. It's not merely everyone else did it, therefore, you must have done it too, which is effectively what Mr. Miller is saying. That is insufficient, improper and should not be adopted by this court.

Second of all, this is not as simple as a red light type of situation because this is not black and white or red and green. This is a nuanced statute that does not prohibit just disclosure, period. As I laid out for your Honor, there are certain elements that need to be pled in order for an improper disclosure to have taken place, and there is a certain type of information that is prohibited, specifically, the identity of the purchaser of the information.

Here, Ms. Gaines alleges she was a subscriber, and harkening back to the data card, if we're going to go back and look at it, the subscriber name was not disclosed. It was the family information, and I take great offense to Mr. Miller's -- on behalf of my client, Mr. Miller's allegation about disclosing information about children in some improper way. I do take great offense to that, and I would object to that type of baseless statement, which is absolutely not pled in that complaint and is used solely as rhetoric to ignite the inflammatory statement such as that. So I would object to that.

And as someone who has in fact defended a number of these cases, I can tell you, and mark my words, that the type of information that goes out in discovery will cause these Plaintiffs to morph and twist their allegations and their theories and claims of the case to somehow state a claim, even if it turns out, as has been the case in a number of other cases, that there are meritorious defenses to what is pled, and so what Plaintiffs are relying on here is simply an industry standard without any specifics as to our named Plaintiff.

Moreover, counsel has misrepresented to you the record with regard to motion to dismiss on the sufficiency of the pleadings. The record that he cited to you was about other types of motions to dismiss. There have been a limited number of decisions on the motions to dismiss the sufficiency of the pleading under 12(b)(6), not 12 (b)(1). Counsel is absolutely wrong that a 12 (b)(1) is the same thing on its own as a 12(b)(6) standard of pleading. Those are two different standards, two different issues, and what we have right now is the majority of cases showing that the types of allegations that have been pled here in these industry standard types of complaints are sufficient. The courts have held that they are not. That is the majority position, not the other way around, your Honor, and with all due respect to the magistrate in issuing the *Brisco* report and recommendation, that decision simply says that they find the *Horton* case, which was issued a

few years ago, to be more persuasive without giving anything further, and a more exacting and more rigorous analysis is required.

Furthermore, the *Horton* case is kind of interesting that the Plaintiffs counsel has cited, you know, discovery and what it shows, because the *Horton* case if we're going to go there, the *Horton* case actually showed that there was not any disclosures to NextMark at the summary judgment stage, but, nonetheless, the court -- the defendants had to go through this whole procedure through discovery, through the time-consuming process, through the expensive process that it is, only to find out that the basis the court allowed the complaint to proceed on, this purported disclosure to NextMark, the agency that's hosting this data card, never happened.

So let's be real clear about what's going on here, despite Mr. Powell's [*sic*] statement that this is about advocating for the privacy rights of consumers, these are lawyer-driven lawsuits. These are lawsuits driven by the statutory penalty that is baked in here and the attorney's fees that come along with that. Ms. Gaines did not come forward in 2016 because she felt like she actually did notice an influx. She came forward in 2022 because the statute of limitations, under their time period, was sunsetting and this was the last time to cash in on these types of cases.

And yes, there have been settlements. That's absolutely

true. Settlements do not mean liability. Defendants settle for a number reasons, and in cases like this, where there is that statutory penalty and there is limited case law on the substantive defenses, when a business looks at that and tries to evaluate the risk and tries to evaluate what it would cost to litigate this, sometimes, yes, those decisions are made, but that is not an indication, and this Court should not take in any way, despite Mr. Powell's statements and his rhetoric, to mean that there is absolutely it's open and shut red light green light type of case because it's far from that.

And this Court needs to exercise its gatekeeper role to avoid launching into that massive discovery that has plagued an already struggling publishing industry, and nonprofit organizations like mine, that are trying to do what Mr. Powell has said, engage individuals, engage families, engage children in important are wildlife conservation efforts, and these types of cases threaten the very mission and the very ability for organizations to do exactly that on things that are not, per se, illegal. Let's keep that in mind.

So to briefly, finally, address the statute of limitations point. I didn't really bring that up in my opening remarks, but I fully acknowledge, your Honor, I fully acknowledge other courts have consistently gone the other way and found that a six-year statute of limitation applies, even though counsel has consistently taken the position that three years applies back

in 2019, and back in 2016 when these cases were filing. They are now taking a position, of course, that it's a six year. So be it.

But we would ask this court to take a strong look at that *Palmer Park* case. That *Palmer Park* case is unique from these situations here, because, what we have here, is not where there's a potential for a statutory statute of limitations that's baked into the statute of limitations versus something else, like the *Palmer Park* case was deciding. What we have here is a balancing that needs to happen between a more specific statute of limitations with regard to personal injury actions and the more general statute of limitations that is the catchall, the six-year catchall, and Michigan law is clear that when there is a potential for a more specific statute of limitation to apply, the Court should adopt that one.

That kind of issue, that kind of interplay between the personal injury actions and a catchall six year was not in place in *Palmer Park*. It was a statutory interest kind of case on an insurance contract, right. So these are only different types of cases, and we would submit that this Court look at the issue anew and, with all due respect to the prior decisions, really look at that in the context of what we're representing here, but, again, the Court need not even go there if it finds that the pleading is deficient, as many of this Court's colleagues have, as well as the chief judge in the Western

District. Thank you, your Honor, for your time and your consideration, and I'm happy to answer any additional questions.

**THE COURT:** I actually have one more question and limit this question to both of you: Do you need me to address -- does it matter -- the Covid tolling issue?

**MS. RODRIGUEZ:** No, you do not need to Covid tolling issue, and we ask this Court to exercise judicial restraint in not doing so. The reason for that is because if you find the six-year statute of limitation applies, then the case -- complaint is timely. There's no need to invoke Covid tolling to make it timely, which has been the case in other matters that were filed after July 31st, 2022. The Plaintiffs needed Covid tolling in order to make the case timely, but this case, you do not need to do so, and so the matter of whether or not the Covid tolling applies to the class period is an important determination but it's one that we do not need to reach here in order to address the sufficiency of the -- or the timeliness of the complaint, and it's one that we would ask the Court not to address, unless -- first of all, if the Court finds the case should continue, which we don't think it should, and, second of all, without the full briefing from the parties, because this is a complicated and nuanced question that really has not been addressed to date.

**THE COURT:** Mr. Miller, if you would address just

that tolling issue?

**MR. MILLER:** I agree with her on that point.

I would ask permission for one minute.

**THE COURT:** Sure.

**MR. MILLER:** One minute. Thank you.

One, your Honor, we're not just relying on industry practice that supports the plausibility of our allegations. We're relying on Rule 8, that our allegations are deemed true at this stage of the complaint, particularly Paragraphs 5 and 7, as well as 1, 11, 43 to 47, 62 to 65, they're deemed true. We get to discovery. It's that simple.

Two, as to Rule 12(b)(1), in order to survive a 12(b)(1) motion and jurisdiction, we have to state a claim upon which relief can be granted, otherwise, there is no case or controversy. So those cases are on point, and, last, I'll talk about the *GameStop* case, because that's one case I ask your Honor to read. It's extremely well-reasoned by Judge Quist. It's right on point, and it shows why this motion should be denied, just like Judge Altman's opinion I think is very well-reasoned.

Now, she asserts that discovery was a dry well in *GameStop*. That is not fair. The case settled. There was no Rule 56 decision, and all that's before you now is do we have enough to get by to open the door to discovery. *GameStop* says yes, as does the overwhelming majority of cases decided by

district courts. Thank you for the minute.

**THE COURT:** Ms. Rodriguez, I'm assuming you disagree with everything Mr. Miller said for the reasons stated.

**MS. RODRIGUEZ:** Absolutely, your Honor. We ask that you grant our motion.

**THE COURT:** So you don't need another minute, right?

**MS. RODRIGUEZ:** I will take as many minutes as you give me, your Honor, but I --

**THE COURT:** You're good --

**MS. RODRIGUEZ:** I respect your time, and I respect your orders.

**THE COURT:** I appreciate your argument. Well-done to both of you, and we will issue a written opinion. Thank you. Have a nice day. Thanks, Andrea, for your help as well.

(Proceedings concluded 3:20 p.m.)

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**C E R T I F I C A T I O N**

I, Andrea E. Wabeke, official court reporter for the United States District Court appointed by the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth. I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/Andrea E. Wabeke — May 9, 2022
Official Court Reporter — Date
RMR, CRR, CSR

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